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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN VINCENT MARTINDALE,

Defendant and Appellant.

H026721

(Santa Clara County

Super. Ct. No. CC318556)

A jury convicted defendant Steven Vincent Martindale of assault with a deadly weapon and found true a sentence-enhancement allegation that defendant inflicted great bodily injury. The trial court struck the enhancement finding and sentenced defendant to the lower term of two years in prison. On appeal, defendant contends that (1) the trial court erred by excluding evidence of the victim's violent character, and (2) he received ineffective assistance of counsel because counsel failed to object to evidence of his prior bad acts. We disagree and affirm the judgment.

BACKGROUND

Defendant and Mark Coyote were homeless acquaintances living on the streets of Willow Glen. They met one morning on Lincoln Avenue and began arguing about panhandling for food and beer. Coyote slapped defendant in the face and threatened to kill him. He then walked away. From behind, defendant struck Coyote in the head with a three-foot-long metal pipe. Coyote turned around and defendant struck and broke Coyote's arm with the pipe.

Defendant testified to a self-defense theory. According to defendant: he met Coyote near the railroad tracks and bought beer; the two drank the beer in a parking lot; Coyote asked for another beer and became angry when defendant refused to buy it; Coyote became angrier and threatened to kill him; Coyote slapped him and again threatened to kill him; he became afraid, saw the pipe, and thought to defend himself with the pipe; he picked up the pipe when Coyote bent down, hit Coyote with the pipe when Coyote stood up and faced him, and hit Coyote two more times before discarding the pipe.

VICTIM'S VIOLENT CHARACTER

Defendant unsuccessfully sought to introduce evidence that, on a previous occasion, Coyote had waved a knife at a group of people at an airport. He argued that the conduct was relevant to his self-defense claim as being evidence of aggressive behavior. Defense counsel urged: "My position is these prior incidents of aggressive behavior, waiving [*sic*] a knife at people walking by, or possessing a butterfly knife is aggressive behavior. That is evidence that the Court should allow the defense to apply, given the fact that the evidence in this case that I believe will be presented will be that Mr. Coyote threatened my client. He hit my client. He threatened to kill my client, specifically, and this aggressive behavior and prior act is in conformity with the aggressive behavior [defendant] is a victim of here."

The prosecutor countered that the evidence was irrelevant because (1) the behavior was not aggressive conduct but "looney conduct" having no specific victim, and (2) Coyote did not possess any knife or weapon in his encounter with defendant.

Defendant conceded that he did not know of the airport incident at the time of their confrontation.

Evidence of a person's character or character trait is generally inadmissible when offered to prove that the person acted in conformity with such character or trait on a specific occasion. (Evid. Code, § 1101, subd. (a).) However, there is an exception where

the defendant in a criminal action seeks to introduce evidence of the victim's character. (Evid. Code, § 1103, subd. (a)(1).) The defendant may introduce such evidence in the form of an opinion, evidence of reputation, or evidence of specific instances of the victim's conduct. (*Ibid.*)

Evidence Code section 1103, subdivision (a), specifically states: "In a criminal action, evidence of the character or a trait of character . . . of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

The statute does not state that victim character evidence is admissible in a criminal trial. It states that victim character evidence in a criminal trial is not made inadmissible by the general statute that makes character evidence inadmissible. It therefore follows that victim character evidence in a criminal trial is still subject to the other rules of evidence. Since "No evidence is admissible except relevant evidence" (Evid. Code, § 350), victim character evidence in a criminal trial is inadmissible if it is irrelevant. " 'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

"The trial court is vested with wide discretion in determining the admissibility of evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 637.) The trial court's determination will be reversed on appeal only upon a finding of abuse of discretion. (*People v. Edwards* (1991) 54 Cal.3d 787, 817, 820.)

"While the concept 'abuse of discretion' is not easily susceptible to precise definition, the appropriate test has been enunciated in terms of whether or not the trial court exceeded 'the bounds of reason, all of the circumstances before it being considered. . . .' [Citations.]" (*Troxell v. Troxell* (1965) 237 Cal.App.2d 147, 152.) "A decision will not be reversed merely because reasonable people might disagree. 'An

appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ [Citations.] In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not be set aside on review.” (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573-574.) This rule requires that the reviewing court engage in all intendments and presumptions in support of the decision and consider the evidence in a light most favorable to the prevailing party. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1015.) It also requires that the party claiming abuse of discretion affirmatively establish the point. (*Smith v. Smith* (1969) 1 Cal.App.3d 952, 958.)

Defendant manifestly fails to carry his appellate burden. He merely reargues his position instead of focusing on the factors supporting the trial court’s decision and explaining why it was irrational to rely on those factors. In any event, it was not irrational for the trial court to conclude that the airport incident was irrelevant to the self-defense issue. Coyote waved a knife at no one in particular in an airport. This conduct might reasonably be considered “looney” or aggressive. The trial court was entitled to draw one inference over another. An inference that the conduct was looney rather than aggressive leads to a conclusion that the conduct is irrelevant to a self-defense theory.

Defendant urges that the trial court did not engage in the process of weighing the probative value of the evidence against its prejudicial impact pursuant to Evidence Code section 352. But defendant never requested the trial court to engage in this process. In any event, it is unnecessary to engage in the section 352 process if evidence is irrelevant at the threshold.

Defendant finally argues that exclusion of the evidence transgressed his due process rights to present a defense. But “the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission

of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]” (*People v. Hall* (1986) 41 Cal.3d 826, 834.) In any event, the excluded evidence in this case was not pivotal to the defense. It was undisputed that Coyote was an aggressor: he slapped and threatened to kill defendant before defendant became aggressive toward him. Thus, the airport-incident evidence was, at best, supportive of the pivotal evidence.

INEFFECTIVE ASSISTANCE OF COUNSEL

Coyote testified that, on a previous occasion, defendant had threatened to kill him and some friends. Defense counsel failed to object on the ground that it was inadmissible propensity evidence. (Evid. Code, § 1101, subd. (a) [character evidence in the form of specific instances of a person’s conduct is inadmissible when offered to prove the person’s conduct on a specific occasion].) Defendant contends that the failure deprived him of effective assistance of counsel.

“To establish constitutionally inadequate representation, a defendant must demonstrate that (1) counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel’s representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1058; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-696.) ‘When a defendant on appeal makes a claim that his counsel was ineffective, the appellate court must consider whether the record contains any explanation for the challenged aspects of representation provided by counsel. ‘If the record sheds no light on why counsel acted or failed to act in the manner challenged, ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,’ [citation], the contention must be rejected.’ ’ [Citations.]” (*People v. Samayoa* (1997) 15 Cal.4th 795, 845-846.)

Defendant bears a burden that is difficult to carry on direct appeal. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) Our review is highly deferential; we must make every effort to avoid the distorting effects of hindsight and to evaluate the challenged conduct from counsel's perspective at the time. (*In re Jones* (1996) 13 Cal.4th 552, 561; *Strickland v. Washington, supra*, 466 U.S. at p. 689.) A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. (*Strickland v. Washington, supra*, 466 U.S. at p. 689; *People v. Hart* (1999) 20 Cal.4th 546.) The burden is to establish the claim not as a matter of speculation but as a matter of demonstrable reality. (*People v. Garrison* (1966) 246 Cal.App.2d 343, 356.) As to the failure to object in particular, "[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel." (*People v. Kelly* (1992) 1 Cal.4th 495, 540.)

Defendant fails to carry his burden. Defense counsel could have reasonably believed that the threat evidence was admissible and refrained from objecting to it on that basis.

The prohibition on admission of propensity evidence does not apply if the evidence is relevant to prove some fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident other than the person's disposition to commit the act. (Evid. Code, § 1101, subd. (b).) Under this section, evidence tending to establish prior quarrels between a defendant and victim and the making of threats by the former is properly admitted to show the motive and state of mind of the defendant. (*People v. McCray* (1997) 58 Cal.App.4th 159, 172.)

Defendant argues that motive or intent was not at issue in the case. He points out that he did not dispute assaulting Coyote. According to defendant, the only disputed issue was whether defendant used a degree of force that was legally permissible in self-defense. This analysis is erroneous.

The general principles of self-defense require that a defendant not only use means reasonable under the circumstances but also harbor an honest and reasonable belief that imminent danger exists. (*People v. Dawson* (1948) 88 Cal.App.2d 85, 96.) Thus, a defendant's state of mind is in issue in a self-defense case even if the assault is undisputed.

Here, evidence of defendant's prior threat tends to negate the reasonable-belief element of self-defense in the sense that it suggests defendant acted from hostility toward rather than fear of Coyote at the time of the incident.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.